

No. 16,034 ✓

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a national banking
association,

Appellant,

Appellee.

Petition by Appellee for Rehearing by the
United States Court of Appeals for the Ninth Circuit

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**Petition by Appellee for Rehearing by the
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Summary of Position of Appellee

Appellee requests that a rehearing be granted because:

(a) If a right of redemption on the part of the Government is crucial, 28 USC § 2410 may be so construed as to support such a right of redemption after a nonjudicial sale.

(b) The redemption is without real value and the decision of the Court results in a legal paradox by giving a federal tax lien the effect of increasing the rights of the taxpayer.

**If a Right of Redemption on the Part of the Government Is Crucial,
28 USC § 2410 May Be So Construed as to Support Such a
Right of Redemption After a Nonjudicial Sale**

The Court's opinion stresses a point not argued by either side in the briefs or oral argument. The Opinion (Page 8) says:

"In our opinion a compliance with subsection '(c)' is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued."

For the convenience of the court there is attached in the Appendix hereto a copy of the first three paragraphs of Section 2410.

In the first place it should be observed that the statute does not specifically state that a right of redemption is a condition to the filing of suit against the United States. It should also be noted that Subsection (a) refers to mortgages upon real or personal property. The first sentence of Subsection (c) states that a judicial sale in any such action shall have the same effect as may be provided under local law. In a great many cases this would be sufficient to grant the Government a right of redemption if such right were provided for under the local law as to judicial sales. This first sentence certainly refers to both real and personal property. The second sentence states a fundamental rule and the use of the word "sale" without modification

would appear to include both judicial and nonjudicial sales relating to both real and personal property. The third sentence dealing with the right of redemption again uses the word "sale" without modification, but is limited specifically to real property. Each sentence appears to be complete in itself and not interdependent either with any other sentence or with Subsection (a). In view of the fact that in one case a "judicial sale" is specifically referred to and in the second two sentences the word "sale" only is referred to, the statute is susceptible of the construction that the Government would have the right of redemption after any sale, whether judicial or not. This interpretation would justify the conclusion of the trial court as reflected in *United States v. Boyd*, 246 F.2d 477 (1957), *Cert. denied*, 355 U.S. 889, that the Government had a right of redemption and would give meaning to all portions of the statute. Certainly from the standpoint of the Government a statutory provision which is for the protection of the Government should be broadly rather than narrowly interpreted.

The foregoing conclusions as to the separateness and independence of Subsections (a) and (c) appear to be in accordance with the intent of Congress in so far as it can be ascertained. S. Rep. No. 1646, 77th Cong., 2d Sess. (1942), (which accompanied H.R. 5578, the bill which amended Section 2410 in 1942) quotes a letter from Honorable Robert H. Jackson, then Attorney General, to Honorable Hatton W. Summers, then Chairman of the Committee on the Judiciary. After stating that the bill would extend the consent of the Government to be sued to suits to foreclose mortgages and other liens on personal property and expressing the view that no distinction should be made between real and personal property for purposes of consent to be sued, Mr. Jackson's letter continues:

"It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. *Welch v. Hamilton* (S.D. Calif.) 33 F. (2d) 224, and *U. S. v. Turner* (C.C.A. 8), 47 F. (2d) 86.

"In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgagees have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

The bill was reported favorably with the changes recommended by the Attorney General and was enacted with those changes.

Subsection (c) was already a part of Section 2410 when provision was made to permit the United States to be sued in quiet title actions. The change was accomplished by insertion of the words "to quiet title or" in Subsection (a) at the suggestion of the Attorney General. Although mortgages and liens on real property could be foreclosed against the United States, the Attorney General stated there should be a procedure for clearing title where that had not been accomplished in the way already permitted. The Attorney General expressed the view that justice and fair dealing required such an alternative method of clearing real estate titles of Government liens. There is nothing in the legislative history to support the conclusions of the Court in this case; and indeed if the opinion in this case is correct the amendment was meaningless.

Therefore, if the Court here, upon reconsideration, feels that the Government consent to be sued in a quiet title action is conditioned upon the existence of a right of redemption, it may so determine in this proceeding, in which event the judgment of the District Court should be affirmed, but modified to set forth the Government's one-year period of redemption.

It would appear that if the Government has this right of redemption it in effect has all rights that it could possibly obtain through any judicial sale since by paying the amount due the holder of the prior lien, the Government would then have the entire value of the property available to satisfy its claim.

II.

The Right of Redemption Is Without Real Value and the Decision of the Court Results in a Legal Paradox by Giving a Federal Tax Lien the Effect of Increasing the Rights of the Taxpayer

The Court here has announced a new legal concept. It has given a federal tax lien a quality unknown to any other lien,—the power to create some previously non-existing property rights to which the lien can attach.

This paradox, which was pointed out in the dissent in *Metropolitan Life Ins. Co. v. United States*, 107 Fed. 2d 311 (C.A. 6th 1939), cert. denied 310 U.S. 630, is found in the following language of this Court appearing on Page 8 of the Opinion :

“It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress.”

The primary misconception is to refer to a divestiture of the lien. It is the property to which the lien attached that has become non-existent. A lien upon nothing is nothing. What has occurred as a result of the nonjudicial sale is simply a failure or termination of the taxpayer's rights in the property. These rights exist and are defined by State law.

A comparable situation would be where X is a legatee under the will of a decedent. The Government levies a tax lien on the interest of X. The will is contested and it is determined to be invalid and X has no interest. Would the court hold that because of the levy of the tax lien any property rights of X survived and were subject in some way to the lien?

Nowhere does the Court cite any statute or holding that rights created under State law may not also be extinguished under State law where a federal tax lien is involved. The rights of the taxpayer stand or fall under State law and in this case the ownership of the taxpayer in the property was terminated under State law. Thus it is inaccurate to speak of the divestiture or extinguishment of the lien. It is the property which has disappeared, and the quiet title action is the proper procedure to establish that fact.

The Court bases its conclusion in reaching the paradox indicated upon the ground that otherwise the Government would not have its right of redemption. We have already pointed out that the right of redemption can be preserved if the statute is so construed as to require it. However, the right of redemption is actually without value, since it is never exercised, and the Court should reconsider and modify its decision.

WHEREFORE, Appellee respectfully requests that a rehearing be granted by this Court.

Respectfully submitted,

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KENNETH M. JOHNSON

Of Counsel

I, ELDON C. PARR, of San Francisco, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing petition for rehearing in the Case of United States v. Bank of America National Trust and Savings Association, is well founded and is not presented for the purpose of creating a delay.

Date: March 2, 1959,

ELDON C. PARR

(Appendix Follows)



Appendix

Subsections (a), (b) and (c) of 28 U.S.C. § 2410 read as follows:

“(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, [including the District Court for the Territory of Alaska,]* or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

“(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

“(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of

*Bracketed words deleted by amendment of July 7, 1958, Pub. L. 85-508, § 12(h), 72 Stat. 348.

the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises."